

Congress of the United States
House of Representatives
Washington, DC 20515

March 18, 2014

The Honorable Kathleen Sebelius
Secretary
U.S. Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue SW
Washington, DC 20201

Dear Secretary Sebelius:

I write to you today to express concern about the backlog of appeals pending with the Office of Medicare Hearings and Appeals (“OMHA”) on several fronts. As Ranking Member of the Ways and Means Subcommittee on Health, I requested that my staff attend the session that OMHA held on this important matter last month. As you know, OMHA has nearly 357,000 appeals pending and has made certain modifications to the appeals process as a result of this backlog. I commend OMHA for recognizing that this is an important issue that must be dealt with and the office’s transparency around this issue but I write today to express concern about the backlog and to provide some suggestions that may help reduce the backlog.

First and most importantly, while I understand that your policies require that Medicare beneficiary appeals be moved to the front of the line such that they are to be heard first, my understanding is that because of the sheer number of appeals, some beneficiaries are even having trouble having their appeals heard. As you know, while a hospital may be able to absorb losses associated with a denial of payment, beneficiaries are on fixed incomes and cannot do so. There must be continued vigilance and new processes established to ensure beneficiaries are getting to the front of the line and that their appeals are not unduly delayed by the backlog. If this has not yet been done, you may wish to consider putting specific staff in charge of ensuring that beneficiary appeals are collated and moved to the front of the line.

Second, I was troubled by the fact that the recovery auditors (“RAs”) were identified as the proximate cause of much of the additional workload that has fallen to OMHA. While I am aware of legislative efforts to modify the RA program, which I have not supported because I believe many of the proposed bills are quite prescriptive, there are several steps that can be taken administratively without any intervention by Congress. These suggestions include the following:

Modify the Two Midnights Policy. In a July 2013 letter that I wrote to Administrator Tavenner formally commenting on the proposed rule establishing the two midnights policy, I indicated that the policy was flawed and unworkable and called on CMS to modify the RA program rather than to implement the two midnights policy. I reiterate that request: instead of implementing the two midnights policy, I believe the underlying issue that is driving the need for more concrete admission standards – the RA program – should be re-examined and modified. I know that CMS has limited the ability of RAs to review claims under this policy while the policy is adjusted but I note that Medicare Administrative Contractors (“MACs”) are able to deny improper claims that they identify as part of the probe and educate reviews. I continue to have serious reservations about this policy and believe that it will only exacerbate the appeals backlog. Finally, I note that CMS is still in the process of determining exactly how certain issues will be addressed as it relates to this policy; in particular, the important issue of hospital transfers has not been fully addressed. Because important issues such as these are not well understood, I ask that you reconsider whether this policy is ready for enforcement – even limited enforcement through probe and educate reviews.

Require Enhanced Accountability for RAs. As you know, currently, there is no associated penalty if a RA collects money from a provider and the decision is overturned on appeal. In short, if a provider wins an appeal, the money is returned to the provider. I suggest that there needs to be some financial penalty associated with RA collections that are overturned on appeal. If providers are winning these appeals by large margins, which seems to be the case, this seems only fair. Whether the RAs are forced to pay the cost of the appeal or whether there is some percentage penalty assessed against the RA, some penalty should be assessed. I am aware that CMS is in the process of recompeting the RA contracts, which provides the perfect opportunity to address this critical issue. I also suggest that going forward, the contracts include performance standards for accuracy of collections from providers.

Ensure the Newly-Announced “Pause” Addresses the Problem. I am pleased that CMS has recognized inherent problems with the RA program and within the last month, CMS has announced a “pause” in document requests associated with the RA program. However, due to the lookback period, these claims could be audited in the future. I suggest that the pause be continued until relevant parties are certain they have a plan in place to (a) make appropriate modifications to the RA program and (b) address the existing backlog of appeals. In addition, you might consider limiting the lookback period associated with claims submitted during the pause.

Impact of Change Request 8425. This month, CMS issued change request (“CR”) 8425, which permits RAs (and other audit contractors) to automatically deny related claims. I am hopeful that you will monitor the impact of this policy on appeals. While I cannot predict the impact of this CR on the existing appeals backlog, I know that your subject matter experts are on high alert to monitor for any interactions between increases in appeals and this expanded authority.

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In short, the backlog in appeals must be addressed and to effectively address the backlog, the primary drivers of potential increases in Medicare appeals must be addressed, including the two midnights policy and the RA program. I know that you are committed to working with me and other interested parties to ensure that these issues are timely addressed. I appreciate your continued work on this important issue and I hope that you will consider these suggestions going forward. Should you have any questions about this letter, please contact Tiana Korley on my staff at (202) 225-3106 or tiana.korley@mail.house.gov.

Regards,



Jim McDermott
Member of Congress